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May 22, 2018

EX PARTE

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 18-141

Dear Ms. Dortch:

U.S. TelePacific Corp. ("TPx") uses unbundled copper loops to provide Ethernet over Copper ("EoC") broadband service to customers in thousands of locations in California, Nevada and Texas. Absent unbundling the vast majority of TPx's EOC customers would be deprived of access to broadband – in some cases not just competitively priced broadband – but ANY broadband service. TPx therefore supports the INCOMPAS Motion to Dismiss¹ and the unopposed² Motions for Extension of Time.³ The Commission's rules and the Administrative Procedure Act ("APA") require that the Commission grant one of the motions.

¹ Motion to Dismiss of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) ("Motion to Dismiss").

² Letter from Diane Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC as 2 (filed May 21, 2018).

³ Motion for Extension of Time of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) ("Motion for Extension of Time"); Revised Motion for Extension of Time and for Protective Order of the California Association of Competitive Telecommunications Companies, WC Docket No. 18-141 (filed May 15, 2018); Motion for Extension of Time of the National Association of Regulatory Utility Commissioners, WC Docket No. 18-141 (filed May 16, 2018); Motion for Extension of Time of the California Public Utilities commission, WC Docket No. 18-141 (filed May 18, 2018); Motion for Extension of Time of the Public Utilities Commission of Ohio, WC Docket No. 18-141 (filed May 18, 2018); Motion for Extension of Time of Massachusetts Department of Telecommunications and Cable, WC Docket No. 18-141 (filed May 21, 2018).

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INCOMPAS Motion to Dismiss

The Petition should be dismissed for failure to comply with the Commission's "complete-as-filed" rule.⁴ As INCOMPAS explains, USTelecom's Petition⁵ "relies on confidential data and purported interviews not attached to the Petition as part of its *prima facie* case"⁶ and "data compilations and analysis ... not ... included with the Petition."⁷ USTelecom's failure to include the information and data on which its *prima facie* case relies violates the *Forbearance Procedures Order*.⁸ The Commission should dismiss the Petition.

Even if the Commission were to conclude that the Petition does not violate the "complete-as filed rule", USTelecom's failure to submit for the record relevant information and data is inconsistent with the APA. This forbearance proceeding is a rulemaking subject to the APA's rulemaking requirements.⁹ The APA requires the Commission to give "interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments."¹⁰ It also requires that the Commission disclose in "detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."¹¹ This facilitates the "exchange of views, information, and criticism between interested persons and the agency" that the APA requires.¹²

The D.C. Circuit has found that agencies cannot shield from public comment the data on which its conclusions rest, explaining that allowing "an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport."¹³

"Fail[ing] to reveal [to the public] portions of the technical basis for a proposed rule in time to allow for meaningful commentary" is a "serious procedural error"¹⁴ that could result in dismissal of any resulting agency decision. Because USTelecom fails to submit the data on which its arguments are based, and any subsequent Commission forbearance ruling likely would be based, the APA's rulemaking requirements have not been satisfied and the Commission should dismiss the Petition.

⁴ 47 C.F.R. § 1.54.

⁵ See *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 18-141 (filed May 4, 2018) ("Petition").

⁶ INCOMPAS Motion to Dismiss at 1.

⁷ *Id.* at 1-2.

⁸ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, 9553 ¶ 17 (2009) ("*Forbearance Procedures Order*").

⁹ See *Verizon v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014).

¹⁰ 5 U.S.C. § 553(c).

¹¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("*HBO*") quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-394 (1973), *cert. denied*, 417 U.S. 921 (1974).

¹² *HBO* at 567 F.2d 9, 35.

¹³ *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

¹⁴ *Id.* at 530.

Motions for Extension of Time

TPx agrees with CALTEL, the California Public Utilities Commission, the Public Utilities Commission of Ohio, the Massachusetts Department of Telecommunications and Cable, INCOMPAS, Granite and others that the Commission should reset the comment period to ensure that parties have sufficient time to analyze the underlying data USTelecom now has committed to file. This will alleviate the serious procedural issues resulting from USTelecom's initial withholding of key data from the public record.

It would be unreasonable to classify USTelecom's petition as anything but "complex" pursuant to the *Forbearance Procedures Order*.¹⁵ A "complex" Petition warrants a pleading cycle longer than 45 days.¹⁶ The movants' proposed pleading cycle – 90 days for comments and 30 days for replies – should be calculated from the time USTelecom's additional supporting data is available for interested parties to review.¹⁷ A longer pleading cycle is consistent with extended pleading cycles in other complex proceedings before the Commission that involved evaluation of pricing, competition and economic analyses,¹⁸ including the Commission's Business Data Services proceeding where the Commission granted repeated extensions – of much greater length – at the request of USTelecom and the ILECs.¹⁹ The complex issues presented in the Petition warrant the same careful consideration by interested parties, their experts, the State Commissions that implement and enforce Section 251(c)(3)'s unbundling requirements, and the Commission.

Respectfully submitted,

/s/ Tamar E. Finn

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¹⁵ Motion for Extension of Time at 2.

¹⁶ *See Forbearance Procedures Order*, 24 FCC Rcd. at 9559 ¶ 29.

¹⁷ Motion for Extension of Time at 1.

¹⁸ Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC to Marlene H, Dortch, FCC (May 15, 2018) at 3, n.15.

¹⁹ *Id.* at 4 n.16.